Office-Supreme Court, U.S.
FILED
MAR 11 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1295

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1984

GWENDOLYN M. PATTON,
Petitioner,

vs.

ROBERT POLK THOMSON and WILLIAM S. EDMONDS,
Respondents,

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

SOLOMON S. SEAY, JR.
P.O. Box 6215
Montgomery, Alabama
36106
(205) 834-2000

Attorney for Respondent

COUNTERSTATEMENT OF QUESTIONS INVOLVED

1. Whether the opinion in this case of the United States District Court for the Middle District of Alabama which was affirmed by the Eleventh Circuit Court of Appeals is in conflict with the Supreme Court's opinion in Alexander v. Choate necessitating review by this Court?

2. Whether the doctrine of sovereign immunity bars private actions in federal courts under § 504 of the Rehabilitation Act of 1973 against state-supported universities which are recipients of federal funds?

PARTIES TO THE PROCEEDINGS

Respondents contest the characterization of Petitioner as handicapped and the inclusion of Alabama State University as a Party to these proceedings.

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OPINIONS AND JUDGMENTS IN THE COURTS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit and the United States District Court for the Middle District of Alabama are included in the Appendix to the Brief of Petitioner.

JURISDICTION OF THE SUPREME COURT

Respondents do not contest jurisdiction of this Court to review this case pursuant to Title 28, U.S.C. § 1254(1). Respondents submit, however, that this is not a proper case for review on Writ of Certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

The constitutional provisions, statutes, ordinances, and regulations set out in Petitioner's brief are correct. In addition, Respondents would cite 34, C.F.R. 104, et seq., a copy of

which has been filed with the Court.

STATEMENT OF THE CASE

Statement of the case set out in Petitioner's brief is correct; thus Respondents adopt the same.

STATEMENT OF FACTS

Respondents adopt as a statement of facts, those facts set out in the District Court's opinion.

SUMMARY OF ARGUMENT

While the United States District Court for the Middle District of Alabama cites City of Mobile v. Bolden, in its opinion for this case, the Court does not rely on Bolden as the primary authority for its decision. Indeed the Court opinion goes further and states that:

> The more compelling reason for denying relief to Petitioner under 29 U.S.C.A. 794 is suggested by the Supreme Court in Southeastern Community College v. Davis. . .

(See Appendix to Petitioner's brief, p. A19.)

The Court in Southeastern focuses on the reasonableness of an accommodation

versus a modification in a program which would be unduly burdensome on the employer. The Court recognizes that the arbitrary refusal to modify an existing program might become unreasonable and therefore discriminatory. Where, however, an effort is made to modify an existing program and such legitimate effort fails to afford the opportunity to the handicapped person to participate, such conduct is not violative of § 504. Section 504 does not require the modification of a program to make it accessible to the handicapped.

Respondents offered several accommodations which allowed Petitioner access to her employment. Given the fact that Petitioner's "temporary handicap" was a result of surgery which after a period of recuperation, Petitioner could return to her assigned tasks, the accommodations offered by the

Respondents were more than reasonable.

The accommodations requested by Petitioner would require a modification of Respondents' program which would jeopardize the purpose and intent of the program, that being of service to the students who desire aid.

The Court in Alexander relied on Southeastern, refusing to specifically address whether § 504 required intentional discrimination only and in suggesting that some forms of disparate impact are covered under § 504.

The doctrine of sovereign immunity bars private action in federal courts against state. When one brings an action against a state alleging a violation of a federal statute, such statute must expressly waive the Eleventh Amendment sovereign immunity defense of the states. The federal statutes under which Petitioner brings

her action fail to contain such waiver.

ARGUMENT

1. The opinion of the lower court in this case is not in conflict with the Supreme Court's opinion in Alexander v. Choate.

The Petitioner argues that the lower court's application of the standard set forth in City of Mobile v. Bolden (requiring a showing of discriminatory intent) in deciding this case has not been heretofore established through statute or case law, and that this court, in Alexander v. Choate, gave some guidance on this issue, and this court's interpretation of the issue is in conflict with the lower court's opinion in this case. Respondents would respectfully disagree with the suggestion that the lower courts relied on the precedents established in City of Mobile v. Bolden in deciding the issues in this case.

The lower court recognized the problem that the courts were having with the disparate intent issue, and cite City of Mobile v. Bolden for the holding that disparate intent or discriminatory intent was a necessary element of a civil rights violation involving race discrimination.

The lower court further held in this case:

> However, a more compelling reason for denying relief to plaintiff under 29 U.S.C. § 794 is suggested by the Supreme Court in Southeastern Community College v. Davis, 442 U.S. 397, 407-412. The court distinguished § 504 of the Act, 29 U.S.C. § 794, affording no affirmative action program in cases such as we now consider, and § 501 of the Act, 29 U.S.C. 791, requiring federal government employers in various degrees to implement an affirmative action program for the handicapped, and concluded as follows:
>
> > Here, neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. Accordingly, we have

> ruled that even if H.E.W. has attempted to create such an obligation itself, it lacks the authority to do so. (A.T. pp. 410-411.)
>
> That court recognized that situations may yet arise where an arbitrary refusal to modify an existing program might become unreasonable and, therefore, discriminatory.

(See Appendices to Petitioner's brief, pp. A19 and A20.)

The trial court therefore relied on the precedent set forth in Southeastern in deciding this case. While the court recognized the disparate intent issue, the trial court felt compelled to rely on Southeastern. The question thus arises whether the opinion of the trial court in this case is in conflict with the opinion in Southeastern.

> Any interpretation of § 504 must be responsive to two powerful but countervailing considerations - the need to give effect to the statutory objectives and the desire to keep § 504 within manageable bounds. . .
>
> Davis struck a balance between the statutory rights of the handicapped

> to be integrated into society and a legitimate interest of federal grantees in preserving the integrity of their programs. While a grantee need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones.
>
> The balance struck in Davis requires that an otherwise qualified handicapped individual must be provided with meaningful-access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made.

Alexander, supra, at 4075.

The trial court in its opinion reviewed the accommodations offered to Petitioner. Respondents offered to grant Petitioner's sick leave for the period necessary for recuperation. This accommodation would have allowed Petitioner to recover from the temporary handicap and fulfill her assigned duties. Respondents further offered to move

Petitioner's orientation class to the second floor of Patterson Hall, eliminating the need of going up and down stairs several times a day. Additionally, University Security would assist Petitioner in negotiating stairs.

Such accommodations were reasonable under the circumstances in that the accommodations allowed Petitioner to participate in the program, teaching students orientation, etc. The accommodations requested by Petitioner, however, would have had the Respondents to make "fundamental" or "substantial" modifications in the program to accommodate Petitioner. The trial court in its opinion reviewed the effects that such modifications would have on the program and accepted the testimony of Dr. Bibb and Dean Thomson as factual. Dr. Bibb testified that the students needed to know the permanent location of the

writing lab so as to facilitate their access thereto in the event of temporary need; that the writing lab was feasibly taught in only one place; that materials needed to be centrally located, since if some were in one place and some in another, there would necessarily be shortages occurring between the two locations; that there should be central clearance for a sharing of responsibilities for obtaining materials and for instruction of the various students coming, and that the primary objection was the confusion to the students who voluntarily come to the writing lab - they need to know the permanent location of the writing lab. (See Appendix C of Petitioner's brief.)

The students who were the beneficiaries of the program would be affected by these "substantial" modifications. Such a fundamental alteration

in the nature of the program is far more than the reasonable modification the statute or regulations require.

The trial court agreed and held

> "that affirmative action on the part of Alabama State University was not required in this situation, and that the various solutions of Plaintiff's problems considered or attempted by the officials of the University indicate that its consideration of the matter was neither arbitrary, unreasonable, nor discriminatory"

(See Appendix C, Petitioner Writ, pp. A20.)

Therefore, the lower court's application of the precedent set forth in Southeastern to the facts and circumstances of this case were correct. The court's opinion focused on the accommodations offered to Plaintiff and the reasonableness of the accommodations. While certain conduct having disparate impact on handicapped persons is covered under § 504, the conduct of the respondents does not reach the conduct suggested in Southeastern or Alexander.

2. The doctrine of sovereign immunity bars private actions in federal courts under § 504 of the Rehabilitation Act of 1973 against state-supported universities which are recipients of federal funds.

Petitioner argues that congressional passage of § 504 was an exercise of its power under the Fourteenth Amendment and thus absolves the state of the defense of sovereign immunity in actions brought against the state by private individuals alleging violations of § 504, therefore the trial court was in error in dismissing Alabama State University as a party defendant on the ground that the state nor Alabama State University consented to suit against it.

We can presume that Petitioner concedes that Alabama State University is an arm of the state and therefore is afforded sovereign immunity. See

Lecompte v. University of Houston System, 535 F.Supp. 317 (1982), where the court held that the Eleventh Amendment bars suits for monetary relief against educational institutions that are so closely connected with state as to be considered instrumentalities of state, even though such institutions may be "persons" within ambit of federal statute governing civil actions for deprivation of rights; such protection also extends to state officials where state is regarded as real party in interest and any liability would have to be paid out of public funds.

> In Alabama v. Pugh. . ., the Supreme Court held that absent express waiver by the state of its Eleventh Amendment immunity. . ., neither the state nor its agencies may be sued for injunctive relief in federal court, although injunctive or prospective relief may be sought against state officials without invoking the Eleventh Amendment bar . . . An award by a federal court of retrospective relief, i.e., damages, payable from the state

> treasury, is prohibited by the Eleventh Amendment even though the suit names a state official as the defendant. . .
>
> Alabama v. Pugh stresses the continuing significance of the distinction between suits against the state or an arm of the state and those against state officials even in actions seeking prospective or injunctive relief. . .
>
> However, the Eleventh Amendment is necessarily limited by the enforcement provision of Section 5 of the Fourteenth Amendment. . . Therefore, Congress has power to authorize suits against state employers by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq.. . . Unlike Title VII, § 1981 contains no congressional waiver of the state Eleventh Amendment immunity. This indicates that Congress did not intend, by the general language of the Civil Rights Act of 1871, to invoke its Fourteenth Amendment power. . .

Sessions v. Rusk State Hospital, 648 F.2d 1066 (5th Cir. 1981).

The Sessions court suggests that private actions brought against states under federal statutes which contain no express waiver of the state's Eleventh Amendment immunity are barred.

Petitioner brought this action under 29 U.S.C. 794 and 42 U.S.C. 2000d. A review of said statute does not reveal express language by Congress limiting the state's Eleventh Amendment immunity.

> The Supreme Court in Florida Department of Health and Rehabilitative Services v. Florida Nursing Homes. . . recently repeated its often-quoted standard for deciding whether a state has waived its constitutional protection and immunity under the Eleventh Amendment.
>
> > [W]e will find waiver only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.

Shinholster v. Graham, 527 F.Supp. 1318 USDC. N.D. Florida (1981). See also Meeker v. Addison, 586 F.Supp. 216 USDC. S.D. Florida (1983), where the court held that waiver of sovereign immunity is not to be lightly inferred, and waiver should only be found where the relevant statutes contain either the

most express language or such overwhelming implication as will leave no room for any other reasonable construction.

The court in Miener v. State of Mo., 673 F.2d 969 (8th Cir. 1982) addresses Petitioner's argument that Congress passed § 504 under the authority of the Fourteenth Amendment which overrides state sovereign immunity, where the court held that abrogation of state's immunity will not be found in absence of express formal abrogation or persuasive legislative history, and intent to sweep away immunity of state could not be inferred from fact, if it was fact, that Education Act was passed pursuant to the Fourteenth Amendment. See also Ciampa v. Massachusetts Rehabilitation Commission 718 F.2d 1 (1st Cir. 1983).

Finally, see Florida Department of Health and Rehabilitative Services, et

al., v. Florida Nursing Home Association, et al., 450 U.S. 147, where this court held, "The state's general waiver of sovereign immunity for Petitioner, Department of Health and Rehabilitative Services, under a statute providing that the Department is a body corporate with a capacity to sue and be sued, does not constitute a waiver by the state of its Eleventh Amendment immunity from suit in federal court. Nor is the Department's agreement upon participating in the Medicaid program, to obey federal law in administering the program, sufficient to waive the protection of the Eleventh Amendment."

Absent express language in federal statutes,limiting a state's Eleventh Amendment immunity, the defense of sovereign immunity is applicable to an action by private individuals against states under federal statutes.

CONCLUSION

Petitioner raises several issues in her petition, none of which begin to meet the standards this Court would apply for reviewing a Writ of Certiorari.

The opinions of the lower courts in this case are not inconsistent with this Court's opinion in Alexander v. Choate.

The issue of sovereign immunity of the states in actions by private persons against states under federal statutes has been addressed by the federal courts of appeals, and there appears to be uniformity in the decisions of the federal courts of appeals. Petitioner's petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

Solomon S. Seay, Jr.
Post Office Box 6215
Montgomery, AL 36106
(205) 834-2000

CERTIFICATE OF SERVICE

I, Solomon S. Seay, Jr., a member of the bar of the Supreme Court of the United States, and the attorney for the Respondents, Robert Polk Thomson and William S. Edmonds, hereby certify that on this the _____ day of March, 1985, I did serve the requisite number of copies of the foregoing on the attorneys for all of the other parties in the Court of Appeals, by mailing the same to them, first-class postage prepaid and addressed as follows:

Arthur Kinoy
Frank E. Deale
Center for Constitutional Rights
853 Broadway, 14th Floor
New York, New York 10003

Vanzetta Penn Durant
639 Martha Street
Montgomery, Alabama 36104

Solomon S. Seay, Jr.

SOLOMON S. SEAY, JR.
Attorney for Respondents,
Robert Polk Thomson and
William S. Edmonds